In the result, the appeal against conviction and sentence is dismissed.

Appeal dismissed.

Solicitors: *Kalpanath & Co.*

HAU KHEE WEE & ANOR. v. CHUA KIAN TONG & ANOR.

[A.C.J. (Chan Sek Keong J.C.) November 22, 1986]

[Singapore – District Court Appeal No. 27 of 1986]

Practice and Procedure – Appeal – Time – Leave to file Record of Appeal out of time – Factors to consider – Subordinate Courts Rules, O.54 r.7.

The appellants claimed damages for negligence against the respondents. The Magistrate by a judgment dated June 5, 1986, dismissed the claim. The appellants appealed against that decision. However, the appellants were out of time by about 24 days as to the filing of the Record of Appeal. They applied for leave to file the Record of Appeal out of time.

The only reason given for the delay was that the solicitors for the appellants had been trying to obtain from the police a set of photographs which were not produced at the trial and which they said were vital to the appellants' case.

Held, granting the application: (1) the factors to be taken into account in deciding whether to grant an extension of time to file a notice of appeal are (a) the length of the delay; (b) the reasons for the delay; (c) the chances of the appeal succeeding if time for appealing is extended; and (d) the degree of prejudice to the would be respondent if the application is granted;

(2) in the present case, taking into account all the factors and the material evidence, the infant appellant should not be denied the opportunity to have his appeal heard.

[*Editorial Note:* Although the application was allowed, the costs of the application were awarded to the respondents.]

Cases referred to:

(1) *Tan Chai Heng* v. *Yeo Seng Choon* [1981] 1 M.L.J. 271.
(2) *Cheah Teong Tat* v. *Ho Gee Seng & Ors.* [1975] 2 M.L.J. 149.
(3) *Lee Guat Eng* v. *Tan Lian Kim* [1985] 2 M.L.J. 196.
(4) *Government of Malaysia* v. *Sim Siok Eng* [1978] 2 M.L.J. 32.
(5) *Revici* v. *Prentice Hall Incorporated & Ors.* [1969] 1 W.L.R. 157.
(6) *C.M. Van Stillevoldt B.T.* v. *EL. Carriers Inc.* [1983] 1 W.L.R. 207.
(7) *Lau Foo Sun* v. *Government of Malaysia* [1970] 2 M.L.J. 70.
(8) *Gan Hay Chong* v. *Siow Kian Yuh* [1975] 2 M.L.J. 129.
(9) *Ratnam* v. *Cumarasamy* [1965] 1 M.L.J. 228.

DISTRICT COURT APPEAL.

Soh Kim Chuan for the appellants.
V.K. Rajah for the respondents.

Cur. Adv. Vult.

Chan Sek Keong J.C.: This is an application by the appellants for leave to file the Record of Appeal out of time. The appellants had appealed against the judgment of the Magistrate dated June 5, 1986 when he dismissed the claim of the appellants for damages for negligence against the respondents.

The Notice of Appeal was filed on June 16, 1986 and by virtue of Order 54 Rule 7 of the Subordinate Courts Rules, the last day for filing the Record of Appeal was on August 16, 1986. This was not done and on September 8, 1986, the appellants' solicitors applied to this court by summons-in-chambers for extension of time. As this procedure was wrong, the solicitors on September 11, 1986, filed this Notice of Motion. The appellants are out of time by about 24 days.

The only reason given for the delay was that the solicitors for the appellants had been trying to obtain from the police a set of photographs which were not produced at the trial and which they said were vital to the appellants' case. Prior to commencing proceedings in the Magistrate's court, the appellants' solicitors had on January 16, 1985 written to the Jurong Police Station for copies of all relevant police reports, sketch plan and damage report relating to the accident. On February 15, 1985, the Jurong Police Station sent a copy of the 1st Information Report to the solicitors. On March 13, the solicitors wrote to the Jurong Police Station for particulars of the driver of the vehicle involved in the accident and his employer and the insurers. On April 7, April 25 and May 7, 1985, respectively, reminders were sent to the police. On May 8, 1985, the police replied that the particulars were not available as investigation was not completed and that the other party did not lodge a police report on the accident. On November 6, 1985, the police wrote to the 2nd appellant direct to inform him that they were not taking further action against the driver and giving the particulars of the driver.

The appellants commenced proceedings in

D.C. Summons No. 6065 of 1985. Prior to the date of hearing of the claim on June 5, 1986, the solicitors for the respondents wrote to the C.I.D. Robinson Road Singapore 0106 for photographs of the scene of the accident which, they were instructed, had been taken by the investigating police officer. On May 27, 1980, the C.I.D. replied and said that the photographs were available. The respondents' solicitors did not take delivery of the photographs and their explanation is that "the Bundle of Documents contained 3 photographs of the scene of the accident. Besides, the photographs could be of little assistance as they were of the scene and not of the 1st appellant or the 1st respondent's position at the point of impact." As a result, the photographs were never produced in evidence at the trial.

So here we have a case where the party in most need of the evidence was, in spite of the diligent efforts of his solicitors, denied the evidence by the police (perhaps due to lack of co-ordination between the Jurong Police Station and the Records Office of the C.I.D.) whilst the evidence was offered to the party who, as it turned out, did not avail itself of it on grounds which are not entirely satisfactory. The three photographs referred to in the Bundle of Documents were taken by the 2nd appellant. His counsel submits that because the 2nd appellant had no training as an investigator, he did not take proper photographs of the scene of the accident. I am inclined to accept this argument if his photographs did not show any tyre marks. The second reason for the respondents' solicitors abstaining from taking delivery of the police photographs has no substance. Until they are produced to and seen by the Court, it is impossible to say that they would be of little assistance.

Sometime after the claim was dismissed, the 2nd appellant informed his solicitor that he had made a police report. So, on June 26, 1986, the solicitors wrote to the Jurong Police Station once more for the police report and was informed by letter dated July 1, 1986 (but received on July 8, 1986), from the Jurong Police Station that there was no police report but that the solicitors could apply to the Scene of Crime Unit, C.I.D. for the photographs. For the first time, the appellants' solicitors became aware of the existence of contemporary police photographs of the scene of the accident. On July 10, 1986, the solicitors duly wrote for the photographs. There was no reply and no reminder appeared to have been sent until September 3, 1986. No reason has been given for this length of inactivity. On September 4, 1986, the appellant's solicitors sent a Draft Index of the Record of Appeal to the respondent's solicitors for approval but was disapproved as it was out of time. Prior to that, the date for filing the Appeal Record had expired on August 18, 1986; the respondent's solicitors had on September 18, 1986, written to the Registrar of the Subordinate Courts for confirmation that the Appeal had been withdrawn and on September 17, 1986, the Registrar gave the confirmation sought.

Looking at the facts, it cannot be denied that the cause of the delay was due in the main to the solicitors for the appellants in failing to send any reminder to the C.I.D. after July 10, 1986, and to some extent by the omission of the C.I.D. to reply until the second letter of September 3, 1986, was sent. The reason given by counsel for the appellants for not filing the Record of Appeal was that he wanted all the documents to be included therein but when it was pointed out to him that since the photographs had never been admitted as evidence. they could not have been included in the Appeal Record and that he would have to apply for leave to adduce fresh evidence in any event, his reply was that he thought that the respondents would not have objected to the photographs being included as part of the Appeal Record. It is abundantly clear that the solicitor involved has made not one mistake but a number of mistakes in the handling of this aspect of the case.

Should the appellants be deprived of their right of appeal because of the mistakes of their solicitors? The real appellant is an infant who is eight years old. He was injured, although not seriously. His claim was dismissed because the Magistrate preferred the driver's evidence to his. The driver said he was driving at about 12 to 15 kilometres per hour at the time of the accident. The Magistrate accepted this and said that the driver slowed down as he approached the junction, looked to the right, saw the infant plaintiff and applied his brake instantaneously. The photographs then in the possession of the police but never seen by the Magistrate showed heavy brake marks running the length of the lorry. If these photographs had been admitted in evidence, they might have cast a very different complexion on the finding of the Magistrate that the driver was driving at 12 to 15 kilometres per hour and that he slowed down immediately before the accident occurred.

Counsel for the appellants seeks the indul-

gence of this Court to grant an extension of time to his clients to file the Appeal Record. He says that there are special circumstances which justify the order *i.e.* it was the fault of the police for not informing him of the existence of the photographs before the trial and for taking an unusually long time to forward them to him. He also says that the appellants' case had merits not only on the pleadings but also on the basis of the police photographs which the respondents' solicitors knew of but did not inform the Court of their existence. He admitted that there was a mistake in not filing the Appeal Record in time, but incredibly did not admit that the mistake was made by him. Whether this reluctance to accept responsibility was due to a defect in character or to the decision in *Tan Chai Heng* v. *Yeo Seng Choon*[1] in which Choor Singh J. decided that the mistake of a lawyer was not a good reason for extension of time to file a Notice of Appeal, is a matter of conjecture. A solicitor should have the courage to admit his own mistakes.

Counsel for the respondents submitted that I should not grant the application on the authorities cited by him. They are: *Tan Chai Heng* v. *Yeo Seng Choon*[1]; *Cheah Teong Tat* v. *Ho Gee Seng & Ors.*[2]; *Lee Guat Eng* v. *Tan Lian Kim*[3]; *Government of Malaysia* v. *Sim Siok Eng*[4]; *Revici* v. *Prentice Hall Incorporated & Ors.*[5]; *C.M. Van Stillevoldt B.T.* v. *EL. Carriers Inc.*[6]; *Lau Foo Sun* v. *Government of Malaysia.*[7]

It is not necessary for me to examine all of them as each case depended on its own facts. Some of them are not directly in point as they deal with applications for extension of time in respect of a different phase of an appeal. For example, in *Tan Chai Heng* v. *Yeo Seng Choon,*[1] Choor Singh J. held that the negligence or mistake of the appellant's solicitor was not a good ground for extension of time to file a Notice of Appeal. Choor Singh J.'s decision is not a direct precedent for the present case which involves the filing of the Appeal Record. In *Gan Hay Chong* v. *Siow Kian Yuh,*[8] the Federal Court of Malaysia was of the view that it would be wrong to apply a general rule that a mistake by a solicitor, by itself, was not a sufficient ground for granting an extension of time to file a Notice of a Memorandum of Appeal. The Federal Court made a distinction between a case of a failure to file a Notice of Appeal in time from a case of a failure to file a memorandum of appeal in time. In the former case, no appeal was in existence and the court would apply a more stringent test. "Here a notice of appeal had been filed. There was an appeal, but there was no record for it to be heard, unless time was extended for filing it" (see page 131 *ibid.*). Similarly, in *Lee Guat Eng* v. *Tan Lian Kim,*[3] the Federal Court of Malaysia granted an extension of time to serve the Memorandum of Appeal and the Appeal Record on the respondent out of time (which was for about 15 days).

In *Ratnam* v. *Cumarasamy*[9] the Privy Council held that the Federal Court of Malaysia properly exercised its discretion in not granting extension of time to file the Appeal Record. There the appellant had not instructed his solicitor to file the Appeal Record until the day before the expiry of the statutory period because he was hoping for a compromise with the respondents. The Privy Council held that to justify an extension of time, there must be some material upon which the court could exercise its jurisdiction and that the Federal Court was correct in holding that the hope of a compromise was not sufficient. In their judgment, their Lordships also noted (at page 12, *ibid*) the distinction between a case where the application is to extend time to set aside a default judgment and a case of an application to extend the time for appealing. In the one case, the litigant has had no trial at all and in the other, he has had a trial and lost.

Applying this observation to the present case, it cannot be said that the appellants had a real trial if vital evidence in existence was not made available to the court through no fault of the appellants' solicitors.

The factors to be taken into account in deciding whether to grant an extension of time to file a Notice of Appeal are:

(1) the length of the delay;

(2) the reasons for the delay;

(3) the chances of the appeal succeeding if time for appealing is extended; and

(4) the degree of prejudice to the would be respondent if the application is granted: see *1985 The Supreme Court Practice* at page 819, 59/4/4.

Applying these criteria, I am of the view that (1) the delay of 24 days, although long, is not excessive in the circumstances; (2) the chances of the appeal succeeding will certainly be enhanced if the brake marks shown on the photographs are taken into account; (3) the real cause of the delay

was the genuine desire of the appellants' solicitors to make available all the evidence before the court and the fortuitous circumstance of the police not replying earlier to him and also his mistake in not realising that the Appeal Record could have been filed without the photographs; (4) the grant of an extension of time cannot prejudice the respondent which is an insurance company of means and the claim comes within the jurisdiction of the subordinate courts. There is the additional but important factor that the court has been denied material evidence which, to the knowledge of the respondents' solicitors, was in existence but not disclosed. I do not go so far as to say that the respondents' solicitors suppressed the evidence but take the view that any potential injustice to the infant appellant, if it can be redressed, should be redressed. There is material on which I can exercise my discretion.

Therefore, in spite of the fumblings of his solicitor, I do not think that the infant appellant should be denied the opportunity to have his appeal heard. Accordingly, I grant the order as prayed.

Application allowed.

Solicitors: *Soh & Partners; Rajah & Tann.*

E.G. TAN & CO. (PTE) v. LIM & TAN (PTE) & ANOR.

[O.C.J. (Chua J.) November 26, 1986]
[Singapore – Suit No. 2860 of 1981]

Tort – Detinue and Conversion – Shares obtained by fraud – Sale of shares to second defendant – Whether second defendant was bona fide purchaser for value without notice.

Estoppel – Estoppel by negligence – Elements of.

Stock and Shares – Detinue and conversion – Shares obtained by fraud.

The plaintiffs were at all material time stock and share brokers and a member of the Stock Exchange of Singapore Ltd. (the SES). The plaintiffs claimed from the second defendant, Sim Kok Wah, the return of delivery of share certificate No. 89407 and the transfer attached thereto for 1000 Pan Malaysia Cement Works Bhd. shares and damages. This certificate was bought by the second defendant from one Khoo Chee Keong who obtained the certificate fraudulently from the plaintiffs.

The plaintiffs have wholly discontinued the present action against the first defendants.

The second defendant contended that (a) the plaintiff as stock and share brokers have negligently allowed Khoo to obtain possession of the share certificate; (b) the second defendant was a *bona fide* purchaser for value of the said shares and had no notice that Khoo had obtained the share certificate fraudulently.

The second defendant submitted that in the premises the plaintiffs are estopped by their own negligence from demanding the return of the share certificate. He also contended that as for damages the plaintiffs are only entitled to the loss of the value of the shares between March 1981 and May 1986.

Held: (1) in the present case the second defendant was not a *bona fide* purchaser for value without notice;

(2) the necessary elements of negligence are (a) a duty of care owed to the party seeking to rely on the estoppel and (b) the negligent conduct must be proximate or real cause of the loss;

(3) mere negligence in dealing with one's own property does not give rise to an estoppel;

(4) the plaintiffs owed the defendant no duty of care;

(5) the only loss suffered by the plaintiff was the loss of the value of the shares and the plaintiffs are entitled to damages for $10,000. The second defendant must deliver to the plaintiffs the share certificate No. 89407 together with the relative transfer forms. The plaintiffs were entitled to the bonus issues and the dividends declared;

(6) the plaintiffs were entitled to the share certificate No. 89407 and the transfer forms attached.

Cases referred to:

(1) *R.E. Jones Ltd.* v. *Waring & Gillow Ltd.* [1926] A.C. 670.

(2) *Mercantile Bank of India Ltd.* v. *Central Bank of India Ltd.* [1938] 1 All E.R. 52.

(3) *Farquharson Brothers & Co.* v. *C. King & Co.* [1902] A.C. 325, 335 to 336.

CIVIL SUIT.

Ng Kian Fong for the plaintiffs.
Denis Tan for the second defendant.

Cur. Adv. Vult.

Chua J.: The plaintiffs have wholly discontinued this action against the first defendants.

The claim of the plaintiffs against the second defendant is the return or delivery of share certificate No. 89407 for 1,000 Pan Malaysia Cement Works Bhd. registered in the name of Chee Kheng Tong together with the relative transfer attached thereto. Damages for detention and/or conversion of the said share certificate No. 89407.

The plaintiffs were at all material times stock and share brokers and a member of the Stock